No. [redacted]58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

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REPLY TO MOTIONS TO AFFIRM

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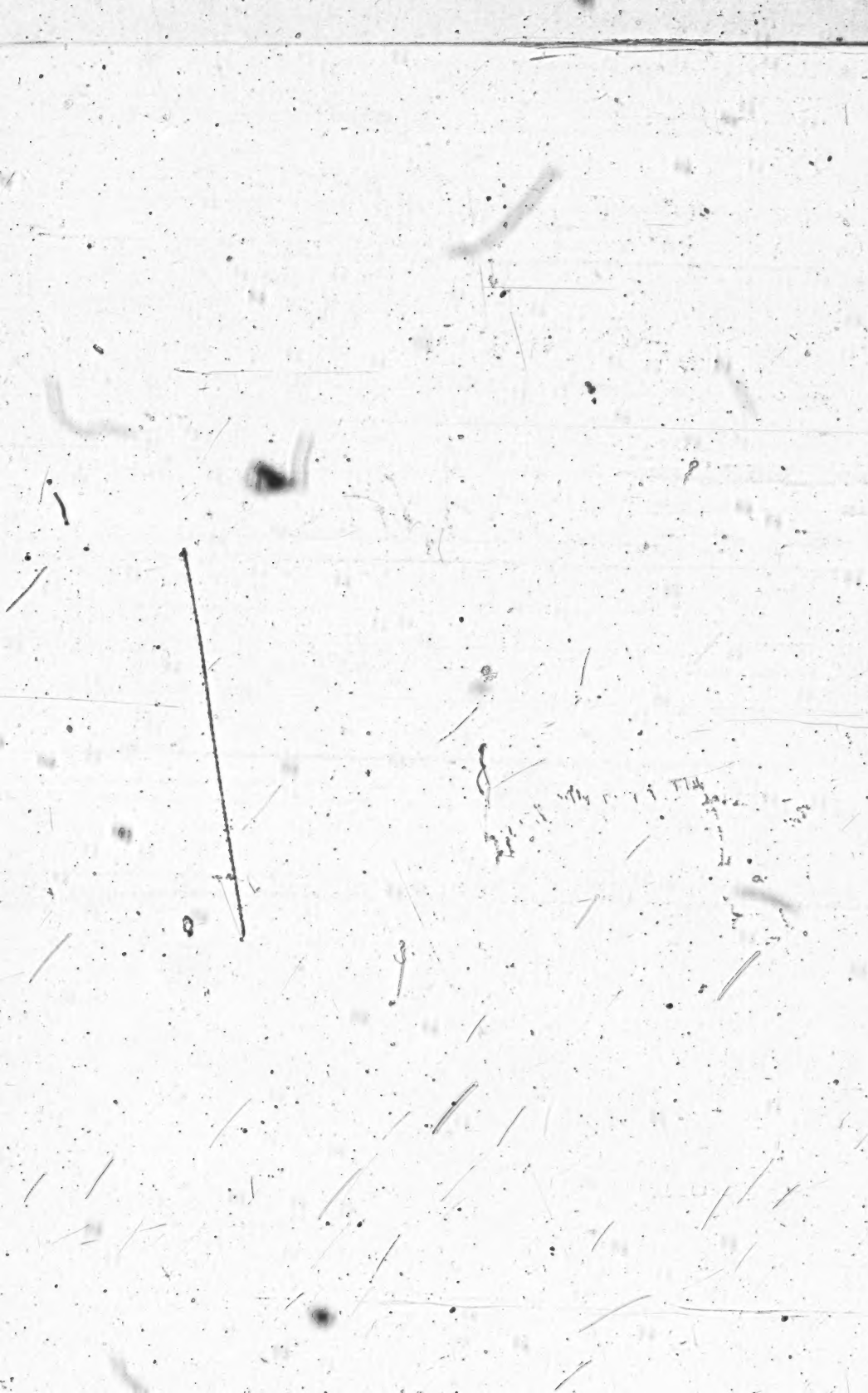

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FEDERAL STATUTES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 746

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Intervenors on behalf of defendants have filed motions to affirm the order of the court below. The United States and the Interstate Commerce Commission are the defend-

ants. Neither defendant has filed such a motion and neither joins in those made by the intervenors, after reviewing the record and conferring with the intervenors as contemplated in their application for additional time filed with this Court on February 11, 1963.

The New York Central Railroad Company has filed a combined motion to affirm in each of the two appeals, Nos. 746 and 747, whereas McNabb Grain Company, et al. have filed separate motions in each of them. The appeals are so intertwined as to be inseparable and these appellants will reply to the motions insofar as they relate to points raised by these appellants on appeal.

At the outset it should be observed that the motions filed on behalf of McNabb Grain Company, et al. misstate the record frequently,[1] charge appellants with statements or contentions they did not make,[2] and seek to avoid certain of the legal questions presented by the appeal by supply-

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[1] E.g. on page 2 counsel makes the irrelevant statement that appellant Mechling is exempt from rate regulation, whereas the evidence of both appellees and appellants showed that Mechling had filed its rates for this traffic with the Commission.

[2] On page 3 appellants are alleged to have criticized the form in which the questioned rates were published. Appellants have not done so. They mention the form to point out (1) that there is no basis in the record or in fact for the Commission's statement that another form (single factor) of rate might have been used, and (2) that separate publication of the 5½¢ rate has made it all the more apparent that the rate for the haul to Kankakee is non-compensatory.

Again Mechling does not expect the rail lines to withdraw from competition as alleged on pages 6 and 7, but only to comply with the act while competing. Indeed, it was conceded before the Commission that some reduction in the inbound rate would be in order, but not such a large reduction that the rate became non-compensatory and destructively competitive.

ing findings which the Commission did not make and which are contradicted by the evidence of record.[3]

Misstatements aside, the only arguments in the motions are that Section 4 requires only the through rate to be compensatory, and that in authorizing a departure from Section 4, no consideration need be given to violation of other provisions of the Act by the rates. Appellants will discuss these points under separate headings. The motions do not face the questions presented in our jurisdictional statement.

The irrational conclusions of the Commission from the facts found are not discussed at all, except to say that the

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[3] Two examples (of many): Seeking to avoid the legal consequences of the non-compensatory inbound 5½¢ rate, McNabb, et al. assert that it is compensatory (a pretense in which the Commission has not joined), putting forward generalized gross revenue comparisons (Motion 4, 5). The Commission's report states that the record here on the costs of this rail service inbound to Kankakee is, that such costs were 8.56¢ or 8.57¢ per 100 pounds for the weighted average distance hauled of 38.3 miles—against that rate of only 5½¢ per 100 pounds. That being the record, as stated by the Commission's report (pp. 439, 450) it is "crystal clear," as the Examiner puts it, that the separately published, water-competitive, inbound rail rate is not compensatory "for the service performed" for that charge.

Again motions of McNabb, et al. assert on page 7, that "only a fraction of the barged corn in Chicago is shipped east by rail." The testimony of record is that nearly all barged corn is shipped east by rail since such shipments represent the most advantageous use of ex-barge billing at Chicago. The Commission erroneously ignored the fact that the applicant railroads as a group received the reshipping rate from Chicago whether the corn was barged to Chicago or hauled by rail to Kankakee, and that the only added revenue available to them (by diverting this inbound barge traffic) to pay for the inbound rail haul was the non-compensatory 5½¢ rate.

Commission's report is "replete with discussion", a fact not questioned by appellants. Appellants urged only that much of this replete discussion did not logically follow from what had been found, or from evidence, and that, however lengthy, the discussion ignored and contained no findings on substantial points. For example, neither motion contains any semblance of logical justification for a conclusion that a river elevator bid is higher and therefore more attractive than a competing rail elevator bid, when the witness testifying to the bids categorically stated that the rail elevator was getting the corn at the time those bids were made.*

I. THE WATER-COMPETITIVE 5½¢ RATE HAD TO BE COMPENSATORY IF THE FOURTH SECTION DEPARTURE RATE WAS PROPERLY TO BE AUTHORIZED.

Both the New York Central and McNabb Grain Company urge that Section 4 requires only the aggregate fourth section departure rate to be compensatory, and that separate factors in the aggregate rate need not be compensatory. (Counsel for McNabb Grain Company concedes (p. 3) that a separately stated factor must comply with Section 1 (5) of the Act, *viz.*, must be compensatory.) The language in Section 4 relied upon by counsel for this contention does not, however, relate to the compensatory rate requirement. They point to the words "greater compensation in the aggregate" found in the first sentence of Section 4(1). There it is a part of the description of those rates for which the Commission's authority is required

* The nature of the attempt to prevent full consideration of the important issues presented is illustrated by the sententious emphasis of McNabb, et al. on the absence of rail shipments from Moronts (McNabb, 747, p. 14). The fact is that there is no elevator in operation there!

before they can be lawfully charged or received. The language does not appear in the subsequent proviso setting forth certain conditions under which the Commission is powerless to grant such authority. In the proviso the requirement is not that the aggregate rate, but that "any charge . . . from the more distant point" be compensatory.[5] That this significant distinction was intentionally made to prevent establishment of any non-compensatory rates or charges from the more distant competitive point is clear from the language itself, from Senator Townsend's discus-

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[5] Section 4(1) reads as follows, through the first proviso:

"4, par. (1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: **Provided**, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, **but in exercising the authority** conferred upon it in this **proviso**, the Commission shall not permit the establishment of any charge to or from the more distant point that **is not reasonably compensatory for the service performed**; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *". (Emphasis supplied.)

sion shown on pages 14-15 of our Jurisdictional Statement, and from contemporaneous decision. (J. S., 17) Both language and purpose of Section 4 condemn such non-compensatory rates, and that condemnation is underscored by the requirement in 1940 that Section 4 must be construed to effect the National Transportation Policy. The motions fail to discuss the conscious destruction of the inherent and admitted low cost advantage of the barge carriers, on the extraordinary ground that the Commission considers it not to be destructive to destroy that which Congress has said must be preserved. (J. S., 9)

Except for the erroneous statement by counsel for McNabb et al. that ex-barge corn at Chicago is not largely reshipped to the east by rail, neither motion discusses the fact that the applicant railroads receive no additional revenue from the corn originating on the Kankakee Belt other than the non-compensatory 5½¢ rate. The New York Central (NYC, p. 10) relies on certain findings of the Commission at 310 I.C.C. 448-449 to the effect that the New York Central (which is not the sole applicant for relief) might save some handling and switching expense in bringing corn into Kankakee from Belt Stations rather than over its circuitous route to Kankakee from Chicago. In the first place the argument made on these findings ignores that other railroads are parties to the application. (Cf. J. S., 17) One, the Illinois Central Railroad, has a more direct route to Kankakee from Chicago. Other applicants (some of which are subsidiaries of the New York Central) perform the involved switching, which is a source of revenue to them.

Fundamental is the fact that even the New York Central will lose its alleged "savings" of these expenses if the discrimination against Chicago is ended, so as to enable Chi-

cago merchants to use the 5½¢ rate freely. The heavy volume of corn which would go to Chicago would incur all the added "expense" which the New York Central says is now "saved", and the only added revenue still would be from the 5½¢ rate, which does not meet out-of-pocket costs incurred up to Kankakee. Thus the hypothetical saving (to the New York Central only) depends for its very existence upon perpetuation of an unlawful discrimination against Chicago, and will continue only so long as shippers at Chicago can be prevented from making effective use of the rate. Such a justification of the 5½¢ rate could be used only when the Commission refused to consider the evidence of various forms to discrimination against Chicago shippers.* Thus it became essential to the Commission's result to maintain that such discrimination need not be considered in proceedings under Section 4, contrary to the Commission's practice hitherto.

This affords yet a further urgent reason why discrimination issues cannot properly be ignored when application is made for authority to depart from the 4th Section. The "savings" argument is specious to support the rates under the 4th Section; *but it does not even exist* if the discrimination against Chicago is unlawful.

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*In the Commission's report these discriminations are enumerated at page 451 as "discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed rate combination applying over Kankakee when prior thereto rates to the east were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations." The Commission expected the applicants to remove the milling-in-transit limitation, (p. 451, **supra**) but did not so order, and they have not done so.

II. THE COMMISSION WAS REQUIRED TO CONSIDER AND MAKE FINDINGS ON THE COMPLIANCE OF THE DEPARTURE RATES WITH OTHER PARTS OF THE INTERSTATE COMMERCE ACT.

Both motions to affirm urge this Court to hold that the Commission may shut its eyes to violations of the National Transportation Policy and Sections 1 (5), 3 (1), and 3 (4) of the Interstate Commerce Act while granting the authority which is a prerequisite to charge the very rates which effect the violations. The Commission's *duty* to enforce the Act imposed by Section 12 is completely ignored.

McNabb et al. urge that no sufficient showing has been made of such violations (McNabb, pp. 9-10, No. 746). That is not the question or the point here. They admit that Section 1 (5) would apply to the 5½¢ rate by itself (McNabb, p. 3, No. 746), thereby requiring it to be compensatory. The point here is that the Commission refused to make any finding as to whether or not it was compensatory or discriminatory, but authorized it nonetheless.

The New York Central relies on *United States* v. *Merchants & Manufacturers Association*, 242 U. S. 178 (1916) (NYC, p. 11) and a group of district court cases, of which one is relevant. It quotes from the opinion of Justice Brandeis in *Merchants & Manufacturers*, but ignores this section which was the key to this portion of the opinion:

> "They are not bound by the order entered; *at least in the absence of such participation.*" (Emphasis supplied)

Yet the New York Central insists that it is irrelevant that the plaintiffs in *Merchants & Manufacturers* were not parties to the fourth section proceeding before the Commission (NYC, p. 11). The whole point of the case was

that the questions raised before the court had not been timely raised before the Commission by the plaintiffs.

In the present case, on the other hand, the Commission has by its own admission had the questions presented to it in the proceeding before it, but has stated it need not make findings on them, despite its duty under Section 12 and its many prior contrary announcements.[7]

The New York Central then cites *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958). In that case the court, relying on the erroneous interpretation of *Merchants & Manufacturers* answered above, stated in a dictum that the Commission need not consider questions of compliance with other parts of the Act in ruling on Section 4 proceedings. The court's rationale (quoted at NYC, p. 12) was additionally erroneous in its assumption that a complaint proceeding would bring before the Commission parties other than the complainants and the carriers complained of. With the wide open protest procedure now followed in Section 4 proceedings, a Section 4 proceeding is considerably more likely than a Section 13 complaint to bring before the Commission all parties affected by a rate proposal.

The New York Central further urges that in fourth section orders, including the temporary order entered in this proceeding, the Commission customarily does not

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[7] On pages 14 and 15 of its motion the New York Central shows the wide range of circumstances in which the Commission has taken the occasion to announce that it would not authorize any fourth section departure rates if they violated any other part of the Act. This distribution well demonstrates the universality with which the Commission had heretofore applied its rule. Significantly neither motion cites any contrary holdings by the Commission prior to this proceeding.

make a final determination of all issues under other sections of the Act and specifically reserves approval under other sections. The Commission makes this reservation to indicate an opening for subsequent complaints by those not parties to the fourth section proceeding. There is, however, no indication in this stereotyped phrase that the Commission will abandon a long-standing practice and refuse to rule on questions of compliance with the Act timely presented to it in fourth section proceedings by parties thereto.

As shown in our Jurisdictional Statement, prior Commission practice, economy of litigation, and the duty of the Commission to enforce the National Transportation Policy and every part of the Act, require that in fourth section proceedings the issues raised by the protests and the evidence be determined by the Commission, and that Commission approval of departure rates be withheld when they violate the National Transportation Policy or other mandates of the Act.

CONCLUSION

The questions presented are substantial; they are important both to the transportation industry and to the Commission. They should be decided by this Court.

For the reasons stated in appellants' jurisdictional statement and herein, the Court should note its probable jurisdiction of this appeal in order that it may be fully advised by brief and oral argument.

Respectfully submitted,

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Date: March 26, 1963.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

DATED at Chicago, Illinois the 25th day of March, 1963.

.....

EDWARD B. HAYES